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Inspector Yusof Hj Othman & Ors v Kwan Hung Cheong

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FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NO 01(F)–7 OF 2011(S)
ZAKI AZMI CHIEF JUSTICE, ZULKEFLI MAKINUDIN AND RAUS SHARIF FCJJ
25 JULY 2011

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Police — Powers — Powers of police — Power to release suspects on police bail under s 388 of the Criminal Procedure Code ('the CPC') — Police applied to magistrate on expiry of s 117 of the CPC remand order for suspects to be released on police bail — Magistrate's notes of proceedings merely contained words: 'Both suspects to be released' — Whether those words meant police's application denied — Whether police could thereafter release the suspects on police bail subject to conditions — Whether facts showed police did not pursue with investigations against the suspects — Whether police had abused their powers by requiring suspects to report to police station every month for seven months to renew extensions of their bail bond — Whether suspects had right to claim damages for breach of their right to personal liberty guaranteed by s 5(1) of the Federal Constitution

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Following their arrest by police on suspicion of committing house-trespass or house-breaking under s 454 of the Penal Code, the respondent and another person ('the suspects') were produced before a magistrate to be remanded for three days under s 117 of the Criminal Procedure Code ('the CPC') to facilitate investigations. On the expiry of the remand period, the police applied to the magistrate for an order that the suspects be released on police bail pending completion of investigations. The record did not show that the magistrate had expressly granted or denied the application. Her notes of proceedings merely recorded the words: 'Both suspects to be released'. Nevertheless, the suspects were brought to the police station and made to sign police bail bonds that released them on condition they returned to the police station at the end of the month. When the respondent turned up at the police station on the appointed date, his bail was extended to the following month when he had to again present himself at the station. That process was repeated monthly for the ensuing seven months. During that period, the respondent wrote several letters to the Attorney General's Chambers ('the AGC') to enquire about the status of investigations into his case. About seven months later, the AGC informed the respondent that it had decided to close the investigations and withdraw the police bail against him. The respondent sued the appellants and applied for his suit to be disposed of by way of determination of three questions of law he posed to the court under O 14A of the Rules of the High Court 1980. The questions were: (1) whether it was lawful for the police to release a suspect on

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a non-bailable offence on police bail under s 388 of the CPC after a magistrate had released him from remand in respect of the same offence under s 117 of the CPC; (2) whether it was lawful for the police bail bond to impose a condition that the suspect had to report at a police station on a fixed date and whether that condition could be extended from time to time for so long as police investigations remained uncompleted; and (3) if the answer(s) to either or both of the aforesaid questions were in the negative, whether the police's action amounted to a breach of the suspect's right to personal liberty guaranteed under art 5(1) of the Federal Constitution and entitled him to claim for damages. The High Court decided all three questions in favour of the respondent and ordered the appellants to pay him compensation, which was assessed at RM3,000. The Court of Appeal upheld the trial court's decision. The appellants were granted leave to appeal to the Federal Court on the same three questions of law.

Held, dismissing the appeal:

(1) Questions (1) and (2) were answered in the positive (the answer to question (2) was found in s 390 of the CPC). But it did not necessarily follow that the appellants were not liable for what they did against the respondent. On the facts of the case, it was not right for the first appellant to have made the respondent sign the police bail bond after he had been released by the magistrate. Although the magistrate did not record whether the application for the suspects to be released on police bail had been granted or not, it could be assumed that the application was rejected. Consequently, the first appellant could not issue the police bail purportedly in exercise of his power under s 388(1) of the CPC. In the absence of a clear order from the magistrate that the suspects were to be released on police bail, the prosecuting officer could not assume that such an order was actually made. When there was such confusion, and it was not due to the respondent's fault, the benefit of the confusion had to be given to him, ie, that the prosecution's application was in fact rejected by the court. To thereafter release the suspect on a police bail bond with conditions attached was an act that defied the court order and was unlawful and amounted to a deprivation of the suspect's personal liberty in contravention of art 5(1) of the Federal Constitution that could give rise to a claim for damages (see paras 27–28, 33–36 & 38).

(2) On the facts of the instant case, the police were not honestly continuing with the investigations into the case. It was an abuse of power. While the police had power to impose bail under s 388 of the CPC even though the suspects had been released from remand under s 117, that power should not be abused, as in this case where the respondent was repeatedly required to present himself at the police station to have his bail extended on each occasion (see para 37).

(3) It was often the case that investigations would not have been completed within the remand period granted by a magistrate under s 117 of the CPC. Section 388 of the CPC was there to assist the police and allow them to release the suspect on police bail while investigations were still in progress. The trial judge's ruling that a police officer's power to release a person suspected of having committed a non-bailable offence under s 388 of the CPC on police bail was only exercisable before the suspect was produced before a magistrate under s 117 was wrong. There was nothing in s 388 or s 117 of the CPC to that effect. To uphold the trial judge's decision on this issue would defeat the intent and purpose of s 388 (see para 26).

[Bahasa Malaysia summary

Berikutan penangkapan mereka oleh polis kerana disyaki melakukan ceroboh rumah atau pecah rumah di bawah s 454 Kanun Keseksaan, responden dan seorang lagi ('suspek') dikemukakan di hadapan majistret untuk direman selama tiga hari di bawah s 117 Kanun Tatacara Jenayah ('KTJ') untuk memudahkan siasatan. Apabila tamat tempoh reman, polis memohon kepada majistret untuk perintah bahawa suspek dilepaskan atas jaminan polis sementara menunggu siasatan tamat. Rekod tidak menunjukkan bahawa majistret telah secara nyata membenarkan atau menolak permohonan. Nota prosidingnya hanya merekodkan perkataan-perkataan: 'Both suspects to be released'. Walau bagaimanapun, suspek dibawa ke balai polis dan diarah untuk menandatangani bon jaminan polis yang melepaskan mereka atas syarat mereka hadir di balai polis pada akhir bulan. Apabila responden hadir di balai polis pada tarikh yang ditetapkan, jaminannya dilanjutkan hingga ke bulan berikutnya apabila dia perlu untuk sekali lagi hadir di balai polis tersebut. Proses tersebut berulang setiap bulan untuk selama tujuh bulan berikutnya. Semasa tempoh tersebut, responden menulis beberapa surat kepada Jabatan Peguam Negara ('JPN') untuk bertanya mengenai status siasatan kesnya. Lebih kurang tujuh bulan kemudiannya, JPN memberitahu responden bahawa ia memutuskan untuk menutup siasatan tersebut dan menarik balik jaminan polis terhadapnya. Responden menyaman perayu-perayu dan memohon untuk guamannya ditentukan melalui penentuan tiga soalan undang-undang yang ia kemukakan kepada mahkamah di bawah A 14A Kaedah-Kaedah Mahkamah Tinggi 1980. Soalan-soalan yang dikemukakan adalah: (1) sama ada ia adalah sah untuk polis melepaskan suspek atas kesalahan tidak boleh jamin atas jaminan polis di bawah s 388 KTJ selepas majistret melepaskannya daripada reman berkaitan kesalahan yang sama di bawah s 117 KTJ; (2) sama ada ia sah untuk bon jaminan polis untuk mengenakan syarat bahawa suspek perlu melaporkan diri di balai polis pada tarikh yang ditetapkan dan sama ada syarat tersebut boleh dilanjutkan dari masa ke masa selagi siasatan polis belum selesai; dan (3) jika jawapan kepada kedua-dua soalan tersebut adalah negatif, sama ada tindakan polis merupakan pelanggaran hak suspek kepada kebebasan peribadi dijamin di bawah perkara 5(1) Perlembagaan Persekutuan dan dia

berhak untuk menuntut ganti rugi. Mahkamah Tinggi memutuskan ketiga-tiga soalan memihak responden dan memerintahkan perayu-perayu untuk membayarnya pampasan, yang ditaksir sebanyak RM3,000. Mahkamah Rayuan mengesahkan keputusan mahkamah perbicaraan. Perayu-perayu dibenarkan izin untuk merayu kepada Mahkamah Persekutuan atas tiga soalan undang-undang yang sama.

Diputuskan, menolak rayuan:

(1) Soalan (1) dan (2) dijawab secara positif (jawapan kepada soalan (2) didapati dalam s 390 KTJ). Tetapi ia tidak semestinya bahawa perayu-perayu tidak bertanggungjawab untuk apa yang mereka lakukan terhadap responden. Atas fakta kes, ia adalah tidak betul untuk perayu pertama mengarahkan responden menandatangani bon jaminan polis selepas dia telah dilepaskan oleh majistret. Walaupun majistret tidak merekod sama ada permohonan untuk suspek dilepaskan atas jaminan polis telah diberikan atau tidak, ia boleh dianggap bahawa permohonan ditolak. Akhirnya, perayu pertama tidak boleh keluarkan jaminan polis yang dikatakan dalam menjalankan kuasanya di bawah s 388(1) KTJ. Dalam ketiadaan perintah jelas daripada majistret bahawa suspek dilepaskan atas jaminan polis, pegawai pendakwaan tidak boleh menganggap bahawa perintah sedemikian sebenarnya dibuat. Apabila terdapat kekeliruan, dan ia bukan akibat kesalahan responden, faedah kekeliruan perlu diberikan kepadanya, iaitu, bahawa permohonan pihak pendakwaan adalah sebenarnya penolakan oleh mahkamah. Untuk kemudiannya melepaskan suspek atas bon jaminan polis dengan syarat yang dilampirkan adalah tindakan yang menentang perintah mahkamah dan adalah salah di sisi undang-undang dan merupakan kepada penafian kebebasan peribadi suspek bertentangan perkara 5(1) Perlembagan Persekutuan yang boleh membangkitkan kepada tuntutan untuk ganti rugi (lihat perenggan 27–28, 33–36 & 38).

(2) Atas fakta kes ini, polis tidak secara jujur meneruskan dengan siasatan ke dalam kes. Ia adalah penyalahgunaan kuasa. Sementara polis mempunyai kuasa untuk mengenakan jaminan di bawah s 388 KTJ walaupun suspek telah dilepaskan daripada reman di bawah s 117, kuasa tersebut tidak patut disalahgunakan, seperti dalam kes ini di mana responden dikehendaki berulang kali hadir di balai polis untuk melanjutkan jaminannya pada setiap masa (lihat perenggan 37).

(3) Ia adalah kes selalunya bahawa siasatan tidak dapat diselesaikan dalam tempoh reman yang diberikan oleh majistret di bawah s 117 KTJ. Seksyen 388 KTJ adalah untuk membantu polis dan membenarkan mereka melepaskan suspek atas jaminan polis semasa siasatan masih dijalankan. Perintah hakim perbicaraan bahawa kuasa pegawai polis untuk melepaskan seseorang yang disyaki kerana melakukan kesalahan

tidak boleh jamin di bawah s 388 KTJ atas jaminan polis hanya boleh dijalankan sebelum suspek dikemukakan di hadapan majistret di bawah s 117 adalah salah. Tidak terdapat apa-apa dalam s 388 atau s 117 KTJ yang memberi kesan. Untuk mengesahkan keputusan hakim perbicaraan atas isu ini akan mematahkan niat dan tujuan s 388 (lihat perenggan 26).]

Notes

For a case on powers of police, see 10(1) *Mallal's Digest* (5th Ed, 2017 Reissue) para 1522.

Cases referred to

Detention of S Sivarasa & Ors, Re The [1996] 3 MLJ 611; [1997] 1 CLJ 471, HC (refd)

Kimat Rai Sanwal Singh Khushalani Accused Petitioner v Emperor AIR 1945 Lahore 215 (refd)

PP v Audrey Keong Mei Cheng [1997] 3 MLJ 477; [1997] 4 CLJ 702, CA (refd)

Legislation referred to

Criminal Procedure Code [IND] s 499
Criminal Procedure Code ss 28, 29, 117, 387, 388, 388(1), 390
Federal Constitution art 5, 5(1), (4)
Penal Code s 454
Rules of the High Court 1980 O 14A

Appeal from: Civil Appeal No S–01–180 of 2008 (Court of Appeal, Putrajaya)

Kamaludin Md Said (Attorney General's Chambers) for the appellant.
David Fung (Alex Pang & Co) for the respondent.

Raus Sharif FCJ (delivering judgment of the court):

INTRODUCTION

[1] This is an appeal by the appellants against the decision of the Court of Appeal on 10 December 2010, affirming the decision of the learned judicial commissioner of the High Court Sandakan ('the trial judge'). The trial judge had allowed the respondent's claim by way of an application on a point of law under O 14A of the Rules of the High Court 1980 ('the RHC 1980').

[2] Leave to appeal was granted by this court on 21 March 2011 on the following questions:

Question 1

Whether it is lawful for the police to release a suspect on police bail under s 388 of the Criminal Procedure Code after the said suspect has been released from a remand order by a magistrate under s 117 of the same Code.

Question 2

Whether it is lawful to impose a condition in the bail bond that the suspect has to appear and report at a police station on a fixed date and whether the said condition can be extended from the time to time for so long as the case against the suspect is still under police investigation.

Question 3

If either or both the police bail described above is unlawful, whether it amounts to a deprivation of the suspect's personal liberty in contravention of art 5(1) of the Federal Constitution giving rise to a claim for damages.

[3] For convenience, the parties will be referred to as plaintiff and defendants as in the trial court.

THE FACTS

[4] The facts of this case is well narrated by the trial judge which are as follows:

(a) on 3 January 2000, the plaintiff and one Mr Lai were arrested without a warrant on suspicion of committing an offence of house-trespass or house-breaking under s 454 of the Penal Code. The arrest was based on a complaint lodged at the Sandakan Police Station by one Ali Latip Taha ('the tenant of the plaintiff');

(b) on 4 January 2000, both the suspects were brought before the magistrate at Sandakan. On application by the first defendant, they were remanded for three days under s 117 of the Criminal Procedure Code ('the CPC');

(c) on 6 January 2000, Chief Insp Choo Peng Yeang applied to the magistrate for an order to release the plaintiff and Mr Lai on police bail pending completion of police investigation. The magistrate ordered both of them to be released. The magistrate wrote in her notes of proceeding: 'Both suspects to be released';

(d) on the same day, ie, immediately after the magistrate had given the order, the police officer brought the plaintiff and Mr Lai to Sandakan Police Station. They were made to sign separate bail bonds issued by the first defendant for an undeposited sum of RM10,000 in two sureties each. Under the police bail bond, the plaintiff had to appear before the first defendant at Sandakan Police Station on 28 January 2000;

(e) on 28 January 2000, when the plaintiff appeared at the Sandakan Police Station, the first defendant endorsed the bail form and extended the bail until 28 March 2000. The process was repeated at about monthly intervals right through 5 October 2000;

(f) in the interim period, the plaintiff wrote to the Federal Attorney General's Chambers to enquire about the decision concerning the complaint against him, emphasising that the whole matter was still hanging over him and that he had to report to the Sandakan Police Station almost every month. The first letter was written on 11 May 2000, followed by letters of reminder dated 26 June 2000, 15 July 2000 and 1 September 2000 respectively; and

(g) on 11 October 2000, the Federal Attorney General's Chambers finally wrote to inform the plaintiff that after careful and comprehensive study of the case, they have decided to close the investigation and to withdraw the police bail against him.

[5] The plaintiff, unhappy with what had happened to him, filed a writ action against the defendants. Subsequently, by way of originating summons under O 14A of the RHC, the plaintiff applied for the agreed issues for trial to be disposed by determining same three questions of law referred to us.

[6] On 24 October 2008, the trial judge decided on all the three questions in favour of the plaintiff. It was declared that the issuance of the police bail dated 6 January 2000 by the 1st defendant against the plaintiff on the terms stated therein was a deprivation of the plaintiff's personal liberty and in contravention of art 5(1) of the Federal Constitution. The trial judge then ordered compensation to be paid by the first, second, third, fourth and fifth defendants jointly and severally to the plaintiff. It was subsequently assessed by the deputy registrar and the sum awarded was RM3,000.

[7] As stated earlier, the three questions that were determined by the trial judge and affirmed by the Court of Appeal are essentially the same questions posed to this court. I will deal with the three questions in turn.

QUESTION 1

Whether it is lawful for the police to release a suspect on police bail under s 388 of the CPC after the said suspect has been released from the remand order by a magistrate under s 117 of the same Code

[8] The trial judge answered question 1 in the negative. The trial judge held that it is unlawful for the police to issue a police bail against the plaintiff who has been released by an order of the magistrate under s 117 of the CPC. The

A trial judge was of the view that the power of the police officer to release any person accused of a non-bailable offence under s 388(1) of the CPC is only exercisable before the accused is produced before a magistrate under s 117 of the CPC.

B **[9]** Before dealing further with the matter it would be convenient to reproduce s 117 (at the material time) and s 388 of the CPC:

> 117(1) Whenever any person is arrested and detained in custody and it appears that the investigation cannot be completed within the period
C of twenty-four hours fixed by section 28 and there are grounds for believing that the accusation or information is well founded the police officer making the investigation shall immediately transmit to a magistrate a copy of the entries in the diary hereinafter prescribed relating to the case and shall at the same time produce the accused
D before the magistrate.
>
> (2) The magistrate before whom an accused person is produced under this section may, whether he has or has no jurisdiction to try the case, from time to time authorise the detention of the accused in such custody as the magistrate thinks fit for a term not exceeding fifteen
E days in the whole. If he has no jurisdiction to try the case and considers further detention unnecessary he may order the accused person to be produced before a magistrate having such jurisdiction or, if the case is triable only by the High Court, before himself or another magistrate having jurisdiction with a view to transmission for trial by
F the High Court.
>
> (3) A magistrate authorising under this section detention in the custody of the police shall record his reasons for doing so.
>
> 388(1) When any person accused of any non-bailable offence is arrested or detained without warrant by a police officer or appears or is brought
G before a court, he may be released on bail by the officer in charge of the police district or by that court, but he shall not be so released if there appears reasonable grounds for believing that he has been guilty of an offence punishable with death or imprisonment for life:
>
> H Provided that the court may direct that any person under the age of sixteen years or any woman or any sick or infirm person accused of such an offence be released on bail.
>
> (2) If it appears to such officer or court at any stage of the investigation, inquiry or trial, as the case may be, that there are no reasonable
I grounds for believing that the accused has committed a non-bailable offence, but there are sufficient grounds for further inquiry into his guilt, the accused shall, pending such inquiry, be released on bail, or at the discretion of that officer or court, on the execution by him of a bond without sureties for his appearance as hereinafter provided.

[10] It is significant to note that s 117 of the CPC relates to a detention of the accused person after arrest, while s 388 of the CPC relates to the release of the accused person after arrest. Under s 117 of the CPC, a magistrate on the application by the police may authorise the detention of the accused person in the police custody from time to time for a term not exceeding fifteen days in the whole. Section 117 of the CPC is in my view derived from art 5 of the Federal Constitution and s 28 of the CPC.

[11] Article 5(1) of the Federal Constitution states that no person is to be deprived of his personal liberty save in accordance with law. Obviously, when a person is arrested, he is being deprived of his personal liberty. For that reason, art 5(4) provides that where a person is arrested and not released, he needs to be produced before a magistrate within twenty-four hours exclusive of the time necessary for the journey from the place of arrest to the magistrate.

[12] Section 28 of the CPC, specifically deals with a situation where a person is arrested without a warrant. The section reads as follows:

> 28(1) A police officer making an arrest without a warrant shall without unnecessary delay and subject to the provisions herein as to bail or previous release, take or send the person arrested before a magistrate.
>
> (2) No police officer shall detain in custody a person arrested without a warrant for a longer period than under all circumstances of the case is reasonable.
>
> (3) Such period shall not in the absence or after the expiry of a special order of a magistrate under section 117 exceed twenty-four hours exclusive of the time necessary for the journey from the place of the arrest to the magistrate.

[13] Thus, under the scheme of art 5(4) of the Federal Constitution and s 28 of the CPC, the maximum period for a person arrested without a warrant can be detained by the police in the absence of a special order of a magistrate under s 117 of the CPC is 24 hours excluding the time requisite for the journey from the place of arrest to the magistrate.

[14] Under the old s 117 of the CPC, the magistrate has the discretion to fix the number of days as he thinks fit as long as it does not exceed 15 days in whole. However, the present s 117 of the CPC limits the discretion to the following:

(a) if the offence which is investigated is punishable with imprisonment of less than fourteen years, the detention shall not be more than four days on the first application and shall not be more than three days on the second application; and

(b) if the offence which is being investigated is punishable with death or imprisonment of fourteen years or more, the detention shall not be more than seven days on the first application and shall not be more than seven days on the second application.

[15] Whatever the limitation imposed by the present s 117 of the CPC, the purpose remains the same ie, giving the magistrate the power to detain the accused person in the custody of the police for the purpose of the police investigation. The workings of s 117 of the CPC is well settled (see *Re The Detention of S Sivarasa & Ors* [1996] 3 MLJ 611; [1997] 1 CLJ 471; *Public Prosecutor v Audrey Keong Mei Cheng* [1997] 3 MLJ 477; [1997] 4 CLJ 702).

[16] It should be noted that s 117 of the CPC makes no mention of a magistrate having the power to release an accused person on bail. The provisions relating to the release of an accused person after arrest on bail are found in ss 29, 387 and 388 of the CPC.

[17] Section 29 of the CPC is the general provision which emphasises that upon the accused person being arrested by a police officer he can only be released on his own bond or under an order in writing of a magistrate or a police officer not below the rank of inspector. Section 387 of the CPC relates to a specific provision whereby an accused person may be released on bond or bail in a bailable offence. It is clearly provides that if the arrested person is prepared to give bail, he must be released on bail either by the officer in charge of the police station where he is under arrest or detention or by the court before whom he appears or is produced.

[18] Section 388 of the CPC is the other specific provision relating to bail. It relates to a non-bailable offence ie, where an accused person is arrested without a warrant. In the present case, the applicable section is s 388 of the CPC as the plaintiff was arrested without a warrant by the police officer on suspicion or accused of committing of house-trespass or house-breaking, which is a non-bailable offence.

[19] The learned senior federal counsel for all the defendants submitted that the trial judge was wrong to restrict the power of the police officer to release the plaintiff on bail to only before the plaintiff was produced before a magistrate under s 117 of the CPC. According to him, such power was still exercisable even after the plaintiff was released from detention under s 117 of the CPC.

[20] The learned counsel for the plaintiff took the opposite view. He endorsed the view of the trial judge and submitted that once the magistrate had ordered the plaintiff to be released following the detention order under s 117 of the CPC, with no condition of release being imposed, the 1st defendant ought

not have issued a police bail against the plaintiff. A

[21] It is significant to note at this juncture that the trial judge had rightly ruled that the power to grant bail under s 388 as in ss 387 and 29 of the CPC is given both to the police officer as well as the court. The complaint by learned senior federal counsel is limited to the trial judge's ruling that it is unlawful for the police to issue a police bail against the plaintiff who had been released by an order of a magistrate. The senior federal counsel argued that the trial judge was in error when he imposed such limitation on the police. B

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[22] To me, there is strong basis for the complaint. This is because there is nowhere in s 388 of the CPC which limits the power of the police officer to issue police bail only before the accused person is detained under s 117 of the CPC. It is my view that s 117 of the CPC is a specific provision relating to a detention of an accused person by a magistrate for the purpose of police investigation. The section makes no mention of the magistrate having the power to grant bail. Section 117 of the CPC operates independently of s 388 of the CPC. In essence, ss 117 and 388 of the CPC deal with two separate situations. As stated earlier, s 117 of the CPC deals with detention of an accused person after arrest while s 388 of the CPC deals with the release of an accused person after arrest. D E

[23] It is to be noted that the magistrate's power under s 117 of the CPC is either to detain the accused person or to refuse the detention. The question that comes to mind is what happens if the magistrate refuses to grant the detention or to further extend the detention of an accused person. Obviously, under such circumstances, the police has no choice but to release the accused person. But, it is my respectful view that the release of the accused person under s 117 of the CPC cannot be equated as an order to acquit and discharge the accused person from the criminal accusation. F G

[24] Thus, in the present case, the plaintiff and Mr Lai at the end of the three days detention period were brought before the magistrate's court. The prosecuting officer then applied for the plaintiff and Mr Lai to be released on police bail pending completion of the police investigation. Unfortunately, the magistrate gave no indication as to whether the application to release both of them on police bail was allowed or otherwise. Instead what was recorded by the magistrate was: 'Both suspects to be released'. H

[25] I am of the view that the release order of the plaintiff and Mr Lai in this case, has to be in relation to their detention under s 117. They cannot be said to have been acquitted and discharged of the criminal accusation and the police cannot be prevented from continuing with the investigation against both of them. I

[26] It usually occurs that investigation could not be completed within the detention period granted by the magistrate under s 117 of the CPC. Section 388 of the CPC is there to assist the police. It empowers the police to release the accused person on police bail, while the investigation is still in progress. Thus, it is my respectful view that the trial judge had erred in deciding that the power of the police officer to release any person accused of a non-bailable offence under s 388(1) of the CPC is only exercisable before the accused person is produced before a magistrate under s 117 of the CPC. Section 388 of the CPC makes no such provision. Neither does such a provision under s 117 of the CPC exist. Thus, to uphold the decision of the trial judge on this issue will have the effect of defeating the intent and purpose of s 388 of the CPC.

[27] Based on the above reasoning, it is my view that question 1 should be answered in the positive. It means that it is lawful for the police to issue a police bail under s 388(1) of the CPC against the accused person who has been released by a magistrate after a detention under s 117 of the CPC.

QUESTION 2

Whether it is lawful to impose a condition in the bail bond that the suspect has to appear and report at a police station on a fixed date and whether the said condition can be extended from the time to time for so long as the case against the suspect is still under police investigation

[28] Having answered question 1 in the positive, my answer to question 2 is also in the positive. The police having the power to grant a police bail must necessarily have the power to impose conditions in the bail bond that the accused person has to appear and report at a police station on a fixed date and the said conditions can be extended from time to time for so long as the case against the accused person is still under police investigation. This is clearly provided by s 390 of the CPC which reads:

> 390(1) Before any person is release on bail, or released on his own bond, a bond for such sum of money as the police officer or court, as the case may be, thinks sufficient shall be executed by that person, and when he is released on bail by one or more sufficient sureties, conditioned that person shall attend at the time and placed mentioned in the bond, and shall continue attend until otherwise directed by the police officer or court, as the case may be.
>
> (2) If the case so require the bond shall also bind the person released on bail to appear when called upon at the High Court or other court to answer the charge.

[29] The section uses the words 'the police officer or court' and 'as the case may be' and this clearly indicate that the power to release a person on bail is given to the court as well as to the police officer. Thus, if an accused person is admitted to bail by an officer of a police station, the officer can require him to execute a bond with one or more sureties binding him to appear before the officer at the police station from time to time.

[30] In India, the court in the case of *Kimat Rai Sanwal Singh Khushalani Accused Petitioner v Emperor* AIR 1945 Lahore 215, in interpreting s 499 of the Indian CPC, which is in pari materia to our s 390 of the CPC, held as follows:

> The words of s 499 are wide enough to include a police station or police officer among the places which an accused person executing a bail bond may be required to attend. The section does not in express terms say that the accused can only be required to attend a court ...

[31] The learned trial judge in the said case also held that:

> Section 499 of the Code provides that before any person is released on bail, a bond with one or more sufficient sureties shall be executed by him binding himself to attend at the time and place mentioned in the bond. It is therefore clear that if an accused person is admitted to bail by an officer in charge of a police station, the officer can require him to execute a bond with one or more sureties binding him to appear before himself or before a court.

[32] I hold the same view in interpreting s 390 of the CPC. It is my view that it is permissible for a police officer to issue a police bail by imposing conditions in the bail bond that an accused person has to appear and report at a police station on a fixed date. The said conditions can be extended from time to time for as long as the case against the accused person is still under police investigation.

QUESTION 3

If either or both of the use of the police bail described above is unlawful, whether it amounts to a deprivation of the suspect's personal liberty in contravention of art 5(1) of the Federal Constitution giving rise to a claim for damages

[33] Having answered questions 1 and 2 in the positive, it does not necessary follow that the defendants are not liable for what they did against the plaintiff. On the facts of this case, I do not think the first defendant was right in making the plaintiff to sign the police bail bond after being released by the magistrate's court.

[34] It must be noted that it is the magistrate's court that has the power to grant bail and not a magistrate while exercising his power under s 117 of the

CPC. As stated earlier, s 117 of the CPC makes no mention of a magistrate having power to grant bail. Further there is no requirement for a police officer at the expiry of the remand period to bring back the accused before the magistrate for his release. But, in the present case, for reasons best known to the police, the plaintiff as well as Mr Lai at the expiry of the three days detention was brought by the prosecuting officer before a magistrate's court. The prosecuting officer's application before the magistrate's court was not for further detention under s 117 but for an order that the plaintiff and Mr Lai be released on police bail pending completion of police investigation. It is rather unfortunate in this case that the magistrate did not record whether the application by the prosecuting officer for the plaintiff and Mr Lai be released on police bail bond was granted or not.

[35] On this issue, I agree with learned counsel for the plaintiff. It can be assumed that the application for the plaintiff and Mr Lai to be released on police bail was rejected by the magistrate's court. Thus, once the magistrate's court had rejected the application, the first defendant could no longer issue the police bail, purportedly exercising his power under s 388(1) of the CPC.

[36] No doubt in the present case, there was no clear order by the court whether the application for the plaintiff and Mr Lai to be released on police bail was granted or not. However, in the absence of a clear order by the court, the prosecuting officer cannot assume that such an order was actually made. When there was such confusion, and it was not due to the fault of the plaintiff, the benefit of the confusion must be given to the plaintiff ie, that the application by the prosecuting officer was in fact rejected by the court.

[37] Therefore, while the police may have powers to impose bail under s 388 of the CPC even though the accused has been released from remand under s 117 of the CPC, this power must not be abused as in this case where the accused was repeatedly required to present himself at the police station only to have his bail form endorsed for him to appear on another date. On the facts of this case the police are obviously not honestly continuing with the investigation into the case. To me that is an abuse of power.

[38] Thus, I would answer the third question in the following manner. The police officer after failing to get the order of the magistrate's court to release the plaintiff on bail, could no longer exercise his power under s 388(1) of the CPC by making the plaintiff to sign a police bail bond and impose conditions thereon. Such an act is in defiance of the court's order. The act was unlawful and it amounts to a deprivation of the plaintiff's personal liberty in contravention of art 5(1) of the Federal Constitution giving rise to a claim for damages.

[39] My learned brothers Zaki Tun Azmi CJ and Zulkefli Ahmad Makinudin FCJ have read through this judgment in draft. I have incorporated their comments for which I am grateful. They have expressed their agreements to the final draft.

[40] Accordingly, for the foregoing reasons the appeal is dismissed with costs.

Appeal dismissed with cost.

Reported by Ashok Kumar